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January 23. 1767.

Unto the Right Honourable, the Lords of Council and Session,

THE
PETITION



OF

George Pitcairn merchant in *Edinburgh*,
and of the Trustees for the creditors
of the said *George Pitcairn*,

Humbly sheweth,

THAT the said *George Pitcairn* was for many years established as a dealer in broad-cloth in *Edinburgh*, and his creditors, for whom the petitioners are trustees, were induced to trust him, under the supposition that he was in good credit and circumstances.

That, in October 1760, a connection appears to have begun between *George Pitcairn* and *Samuel Foggo* banker in *Edinburgh*, which produced a variety of transactions between them, from that period down to the month of April 1764, when *Pitcairn* became notoriously bankrupt, and the petitioners, his creditors, were not a little surprised to find themselves totally excluded from his effects, by the alertness of *Mr Foggo*, who, partly by diligence and partly

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partly by voluntary conveyance, had secured every shilling of the bankrupt's funds, in payment of a very large balance of no less than 4633*l.* 3*s.* 2*d.* which he pretended was due to him.

That the petitioners, upon enquiry, were informed, and Pitcairn himself acknowledged, that very great advantages had been taken of him by Foggo, and that the whole transactions between these two persons were of such a nature as required further examination.

Accordingly, after some steps, unnecessary here to be mentioned, the present action was commenced in the name of the petitioners, against the defender Samuel Foggo, for setting aside the grounds of debt, conveyances and diligences in his person, upon a variety of grounds specified in the libel, the most material of which were, that the transactions between the defender and Pitcairn, which had given occasion to so great a balance in his favour, were *usurious*; that Pitcairn had been grossly overcharged in a variety of particulars; and *separatim*, that a bill granted on the 4th February 1764, for the afore-said large balance, together with the after-conveyances in favour of the defender, fell to be reduced, as fraudulent and unduly obtained, to the prejudice of the other lawful creditors.

That the process having come before the Lord Kaims Ordinary, an exhibition was obtained, of accompts, books, letters, and other writings, so far as necessary for illustrating the transactions between Foggo and Pitcairn, and, from the evidence produced, the following appears to be a true state of the fact.

George Pitcairn had launched out into trade somewhat imprudently, beyond what his stock could afford, and was obliged to resort to the defender for the loan of money to support his credit. In the beginning their transactions were moderate. Mr Pitcairn, when he was in need of cash,

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applied to his bankier Mr Foggo, and the advances thus made to him, he replaced when he had money in his hands.

The first settlement of accompts between them, was in June 1761, and a balance was then struck against Pitcairn, of 635 *l.* 9 *s.* 2 *d.* commission being allowed to Mr Foggo at $\frac{1}{4}$ *per Cent.* upon the sums advanced, and interest at five *per Cent.* In September 1762, a second accompt was fitted, and a balance came out against Pitcairn of 1683 *l.* commission having been stated by Foggo at the rate aforesaid, besides the legal interest.

About this time, Pitcairn began to be straitened in his circumstances, and, at a third clearance in July 1763, the balance came out against him no less than 4115 *l.* for which he granted bill. This balance was adjusted by the defender in such manner as he thought proper, sundry articles being overcharged and erroneously stated, and the commission raised to $\frac{1}{2}$ *per Cent.* in place of $\frac{1}{4}$, formerly charged. Mr Foggo was by that time fully apprised of the necessitous situation of Pitcairn, and he was resolved to take advantage of it. He had the entire command over him, by reason of the large bill then due, and he knew well that it was in his power at any time to render him bankrupt.

Not only did he contrive matters so as to overcharge and state articles at pleasure, but he took care to secure himself against all danger from the interference of other creditors, in a way which will not much be approved of by your Lordships.

From the month of June 1763 downwards, to February 1764, Mr Pitcairn was prevailed with, from time to time, to put the whole bills belonging to him, granted by third persons, together with lists of all the debts due to him, into the hands of the defender, who kept these bills as a pledge or security for his own payment in case of need ;

need; and if he should at any time find it necessary to secure himself further by diligence, the list of debts served as an information to him in whose hands to use arrestment. He further had access to the whole of Mr Pitcairn's books and papers, from which he was enabled to judge of the real state of his affairs, and must at once have seen that he was totally insolvent, though he now pretends, Mr Pitcairn at that time made him believe, that, after paying all debts, he would have 1000 *l.* of reversion.

That Foggo was well apprised of the real state of the bankrupt's affairs, as far back at least as July 1763, appears not only from the bills and list of debts thus put into his hands, but from another circumstance, of which there is evidence in process. In the middle of July 1763, Mr Pitcairn found it necessary, with the approbation and consent of his friend Mr Foggo, to make a voyage to the Islands of Orkney and Shetland, in order to gather in some debts which were there owing to him; but before setting out, Mr Foggo caused him sign the following letter. "As, by my acceptance to you of the 10th current, I am debtor to you for 4115 *l.* Sterling, which I think is too great a sum upon my own personal security, I desire you will cause make insurance on my life for one year, for the sum of 2000 *l.* Sterling, the charge whereof I shall be accountable to you for." Accordingly Mr Foggo says, that he wrote immediately to London, and got the policy effected, and he has since stated the premium of insurance, being no less than 100 *l.* 5*s.* 6*d.* against Mr Pitcairn.

It will be observed, however, that at the time of executing this policy, which, from his correspondent's letter now produced, appears to have been done at the defender's desire, and for his behoof, no voucher of the insurance was delivered to Mr Pitcairn, so that if he had died upon

upon his voyage to Shetland, or at any time within the year, Mr Foggo had it in his power to pocket this 2000 *l.* without the heirs of Pitcairn, or his other creditors, knowing any thing of the matter. And what is still more remarkable, he took possession of the whole bills and other vouchers of debt belonging to the poor man, upon blank indorsements, without a receipt or writing of any kind to show where they were, or for what purpose they had been conveyed; so that had Pitcairn died before the present enquiry was set on foot by the other creditors, he had it in his power to appropriate these bills to himself, and at the same time to keep up the whole of his present most unjust and rigorous claim, and operate payment of it from the other effects, so far as they would go for that purpose.

In the mean time Pitcairn's correspondents in England, and others who had occasion to deal with him, went on as usual trusting him, on the faith that he was in good circumstances, no person, except this defender, being in the secret of the real state of his affairs. Some of them indeed began to be a little suspicious of his credit, as he had for some time been slower than usual in his payments, but, by a very strange fatality, it happened, that the person applied to for information on that head, was *Samuel Foggo himself*: and your Lordships will observe from the letter now to be recited, what sort of answer Mr Foggo was pleased to make. Mr Richard Strother of Leeds, one of the creditors for whom the petitioners are trustees, having wrote to Mr Foggo in the beginning of July, concerning a report which he had heard unfavourable to Pitcairn, Mr Foggo makes answer as follows.

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Dear

Edinburgh 4th July 1763.

Dear Sir,

July 4.
1763.

“ In answer to your favour of the 1st current, there is
 ‘ no truth in any bad report concerning G. P. and it
 ‘ must have been invented by some ill designing person,
 ‘ whom I should be glad to know, as he might, whoever
 ‘ he be, be severely punished, being a very tender point, a
 ‘ man’s credit attack, and you’ll do well to contradict any
 ‘ such report; for I can assure you *from my own proper*
 ‘ *knowledge*, that there is nothing in it: Should you write
 ‘ me any more on this subject, let it be in a separate let-
 ‘ ter from business, as I would not chuse any one to see
 ‘ letters of that kind. I remain, Dear Sir,

Your most obedient Servant,

SAMUEL FOGGO.

In like manner, Mr Leister of Bedhall in Yorkshire, having entertained the same doubts with regard to Pitcairn, was verbally assured by the defender, that he was in good circumstances, and might be safely trusted.

It would have been unsafe for Mr Foggo, to have given any alarm at this time to the creditors. He had but just begun his operations, by taking bills and other securities for his indemnification, and the too sudden bankruptcy of Pitcairn would have been a severe shock to his own credit. It was much better to allow Mr Strothers, and the other gentlemen who dealt with Pitcairn, to go on and furnish him with goods as usual; and Mr Foggo might take his own time of declaring the bankruptcy, and of seizing on the effects when Pitcairn’s hands were full, and his shop well stored with goods, furnished by those very persons who were thus induced to deal with him. This was precisely what happened. Mr Strothers and the other

ther gentlemen sent down their goods as usual. Mr Pitcairn returned from the Orkneys, and continued to labour on, entirely in the mercy of Foggo, till Spring 1764; and on the 4th of February that year, their last clearance was entered into, which produced a balance of 4633 *l.* 3 *s.* 2 *d.* in favour of Mr Foggo, according to his method of stating the accompt, which was acquiesced in without any objection by Pitcairn, in the hopes of meeting with compassion from this rigorous creditor.

This balance exceeded the former above 500 *l.* Sterling, although, between July 1763 and February 1764, there had scarce been any transactions between them, but almost the whole of it was composed of interest upon the former balance, by which means he got interest upon interest within the year, commission-money at $\frac{1}{2}$ *per Cent.* exchange, and a new article introduced for the first time in this clearance, *viz*, The expence of *drawing and remitting* London bills, in order to support his credit, from the month of May 1763 down wards. Of this article your Lordships will hear more in the sequel. The sum accumulated in this last clearance, in name of interest, commission, insurance, and charge of drawing and re-drawing, amounted to about *17 per Cent.* merely for the forbearance of payment during the last six months of their transactions.

The bill taken for the large balance, thus ascertained, was payable one day after date, as was also another bill, taken on the 18th of the same month of February, for 57 *l.* Pitcairn agreed to every thing that was desired of him, in the expectation that Foggo would still support him. It appears however, that Mr Foggo only waited the proper time for striking the blow with the greatest effect, and for sweeping off every thing, in payment not only of the debts justly due to him, but of his undue exactions, to the exclusion of all the other creditors, even those whom
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he had induced to make furnishings to the bankrupt. On the 2d April 1764, he obliged Pitcairn to grant conveyance to him of his stock and profits in a copartnery with messrs. Hepburn and Blair, merchants in Edinburgh; and of his share in the vendition of a ship. All this was complied with by Pitcairn, in the expectation of still retrieving his affairs; but the very next day (3d April, 1764) Mr Foggo gave him the finishing stroke, by raising and executing a horning against him upon the foresaid large bill, of date 4th February, and arresting all his debts and funds, which he was enabled instantly to do, by the assistance of the above list which had been put into his hands. Further, he, with concurrence of the landlord, obtained a sequestration of the shop, which was then well stored with goods, to the extent of 2000 *l.* Sterling, and having thus got the start of all the other just and onerous creditors of Pitcairn, was about to execute a pointing, which could not be otherwise stopt than by their holding it as compleat. Pitcairn himself was a few days after booked in the Abbey, and thereby rendered notourly bankrupt.

At the same time, these operations could not be carried on without occasioning a temporary run upon the defender: He was obliged, for a few days, to stop payment, until matters were put on a proper footing with Pitcairn; but it soon appeared, that he had been no loser; on the contrary, a very great gainer by this connection, and his credit was immediately re-established.

George Pitcairn having granted a disposition to the other petitioners, as trustees for his creditors, to which Mr Foggo has refused to accede, these trustees have thought it their duty, to bring Foggo's debt and diligence under challenge by the present reduction, as, without their prevailing in it, the other just and onerous creditors of George Pitcairn must be totally disappointed. In this situation their plea must be considered in the most favourable

favourable light ; and on the other hand such circumstances occur in relation to the defender's claim, as render it highly unfavourable and oppressive.

The Lord Ordinary, on hearing parties, of this date, July 6.
1765.
“ remitted to Francis Farquharson accomptant, to state
“ an accompt of what is justly due, and to remark upon
“ the articles overcharged, whether they appear to be errors only, or designedly overcharged.”

Mr Farquharson, in terms of this interlocutor, made a very distinct report, which is hereto annexed for the perusal of your Lordships, and, in order to understand what follows, it will be necessary to read it.

Your Lordships will observe, that of the large bill of 4633 *l.* 3 *s.* 2 *d.* which is the foundation of Mr Foggo's diligence, and the chief object of reduction, Mr Farquharson, in examining the accompts from which it was composed, has struck off articles to the amount of 244 *l.* 14 *s.* 4 *d.* Sterling as improperly charged, and in the memorandum towards the end of the report, he makes observes on ~~one~~ these two articles of 16 *l.* 16 *s.* 3 *d.* and 14 *s.* 4 *d.* of which deduction was also craved, but as to which he gave no opinion.

The cause having come back to the Lord Ordinary, the defender agreed, that these two articles should also be struck off ; and his Lordship, of this date, pronounced July 3.
1766
the following interlocutor ; “ Approves of the subauditor's report, and of consent of the defender, finds that
“ the sums of 16 *l.* 16 *s.* 3 *d.* and 14 *s.* 4 *d.* Sterling, must
“ also be deduced from the bill of 4633 *l.* 3 *s.* 2 *d.* sustains
“ the said bill *quoad ultra* after these deductions ; finds
“ that there is no foundation for the charge of usury, and
“ therefore assoilzies from the reduction, and decerns.”

By this interlocutor the total sum struck off, as unjustly exacted by the defender, is 262 *l.* 4 *s.* 10 *d.* which would have been levied out of the bankrupt's effects, had not the

other creditors interposed ; but the bill *quoad ultra* is sustained, which is a very great hardship upon the creditors, considering the unfair methods that were taken to dis-appoint them, and to secure the defender's preference. The petitioner therefore represented against the interlocutor ; praying the Lord Ordinary to find, *1mo*, That Mr Foggo was not entitled to charge the article of 30 *l.* 3 *s.* 7 *d.* in name of commission. *2do*, In respect of part of the other articles already disallowed, to find the bill null and void, as containing usurious exactions: Or at least *3tio*, To reduce the same, with the diligence done upon it, to the effect of setting aside the preference claimed by the defender, and bringing him in *pari passu* with the other creditors, under the trust-right.

His Lordship, on advising this representation with an-
 Nov. 19
 1766. swers, adhered to the interlocutor. The petitioners again applied to the Lord Ordinary, praying him to reduce upon the grounds formerly mentioned, and further to set aside all indorsations, accompts and conveyances, impetrated from Pitcairn subsequent to the 10th July 1763, as fraudulent, and particularly those granted at any time within 60 days of the notour bankruptcy. His Lordship, however, upon advising this representation with answers, of this date again adhered ; and the
 Dec. 19
 1766. petitioners hope they will be excused for laying the case before your Lordships.

From the above state of facts it appears, that the petitioners have so far been justified in their challenge, that they have already obtained a deduction of articles included in the bill, to the amount of 262 *l.* Sterling ; and the question which remains to be considered, is three-fold, *1mo*, Upon supposition that the bill and diligence is to stand, how far they are intitled to any further deduction. *2do*, How far there do not occur sufficient reasons for reducing the whole of this debt on the head of usury
3tio.

3thio. Whether the bill and diligence, and the several conveyances in favour of the defender, do not fall to be set aside on the head of fraud, and upon the bankrupt statutes.

Upon the first of these heads, the only article which now remains in dispute, if the bill is not totally to be set aside, is that of commission-money, charged in the original accompts at $\frac{1}{4}$ and afterwards at $\frac{1}{2}$ *per Cent.* With regard to this, the only justification attempted by the defender was, that it was the universal practice of the Edinburgh bankers, to state commission upon monies advanced by them over and above the legal interest; and that this practice had a foundation in reason, because they were obliged to have money constantly by them to answer demands, besides the expence of clerks, furnishing books, &c. It was further said, that the reason why no such article was charged by the London bankers, was, that they gave no interest to their employers for money lodged with them; whereas the Edinburgh bankers give 4 *per Cent.*

1st. Point
Deduction of
Commission-
money.

It is agreed on all hands, that by law no more can be exacted for the loan of money, or forbearance of payment, than the legal interest of 5 *per Cent.* together with exchange, in case it falls due upon the negotiation of bills; and consequently if $\frac{1}{2}$ *per Cent.* more is exacted for the mere advance of money, it is plain, that such exaction is illegal, and cannot be justified by the alledged practice of any set of merchants. It is very true, that where a merchant is employed in buying and selling for another, or perhaps in negotiating bills which require extraordinary trouble or attention, he may be allowed to state a small gratification, in name of factor-fee or commission; and upon enquiry it will be found, that it is only in the case of such negotiations, that the generality of bankers in Edinburgh think themselves entitled to charge commission. But where nothing more passes between the parties than the borrowing and lending money,

Answer.

money, and more especially where, as in this case, they happen to reside in the same town, there cannot be the smallest pretence in reason, far less in law, to support such a claim. The practice of the bankers in Edinburgh is, to give out money at 5 *per Cent.* and to receive it at 4, by which means they have one *per Cent.* of profit upon such transactions; and to exact $\frac{1}{2}$ *per Cent.* more, under the pretence of keeping books, and clerks, &c. which are indispensibly necessary for carrying on the other branches of their business, is most usurious and most unjust.

The negotiation of bills, and other articles which compose the proper business of a banker, as practised in this country, require their not only keeping clerks and books, but a constant supply of cash in their computing-rooms; and as they are under no obligation to lend out this cash upon interest, so, if they incline to do it, they must conform themselves to the rules of law, and not demand a higher rate of interest than all the rest of the lieges are intitled to. The real expence of the paper, pen and ink, and of writing the bond or bill, may, no doubt, in every case be allowed, but to lay an additional $\frac{1}{2}$ *per Cent.* over and above the legal interest, upon every sum borrowed from a banker, let the sum be ever so great, under the pretence of inconveniency or trouble in lending it, is an imposition expressly against law, and which no practice can justify.

The practice of the London merchants will no way avail the defender; for it is, no doubt, in any man's power, to refuse paying interest for money put into his hands; but it is not in his power to take more than legal interest for money advanced by him. The London bankers pay no interest, for this reason, that money is generally put into their hands to lye only for a day or two, and orders are perhaps given upon them, to pay it out to a hundred

red different persons ; so that little or no use is made by them of that money, and they are obliged to keep numbers of clerks and runners, who are perpetually employed in collecting payment of the bills discounted by them ; by which means their trouble is greater and their profits less than those of the Scots bankers, independent of the article of commission.

Neither does it alter the case, that Mr Pitcairn suffered commission to be stated against him in the several accounts settled with the defender. Pitcairn was, at the time of these settlements, entirely at the mercy of Mr Fogg, and was obliged to allow every article he was pleased to charge. Of this a most glaring evidence arises from his accepting the very bill in question, and granting assignments of his own effects in security thereof, though it now stands confessed, that this bill was drawn for 262 *l.* more than was justly due. If Pitcairn's acquiescence were sufficient, the same reason would apply, for subjecting him to all the other gross articles composing that overcharge of 262 *l.* Sterling ; and indeed the same reason would support every usurious transaction whatever, as without a mutual agreement no such thing can happen.

And this leads to the second point to be considered by your Lordships, *viz.* Whether the petitioners are not entitled not only to a rectification of this unjust article, as well as the others above-mentioned, but to a total reduction of the debt on the head of usury. The statute of Q. Anne declares, " That no person or persons whatsoever, from and after the nine and twentieth day of September, in the year of our Lord 1714, upon any contract which shall be made from and after the said nine and twentieth day of September, take, directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of 5 *l.* for the forbearance of 100 *l.* for a year, and so after

2d Point.
usury.

12. Anne,
Cap 16.

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that

' that rate for a greater or lesser sum, or for a longer or
 ' shorter time ; and that all bonds, contracts and assur-
 ' ances whatsoever, made after the time aforesaid, for pay-
 ' ment of any principal, or money to be lent, or cove-
 ' nanted to be performed upon, or for any usury where-
 ' upon or whereby there shall be reserved, or taken, above
 ' the rate of five in the 100 *l.* as aforesaid, shall be utter-
 ' ly void ; and that all and every person or persons what-
 ' soever, which shall after the time aforesaid, upon any
 ' contract to be made after the said nine and twentieth
 ' day of September, take, accept, and receive, by way and
 ' means of any compt, bargain, loan, exchange, chevi-
 ' zance, shift, or interest of any wares, merchandize, or
 ' other thing or things whatsoever, or by any deceitful
 ' way or means, or by any covin, engine, or deceitful
 ' conveyance, for the forbearing or giving day of pay-
 ' ment, for one whole year of and for their money, or
 ' other thing, above the sum of 5 *l.* for the forbearing of
 ' 100 *l.* for a year, and so after that rate for a greater or
 ' lesser sum, or for a longer or shorter term, shall forfeit
 ' and lose, for every such offence, the treble values of the
 ' monies, wares, merchandizes, and other things so lent,
 ' bargained, exchanged or shifted. And be it further
 ' enacted by the authority aforesaid, that all and every
 ' scrivener and scriveners, broker and brokers, solicitor
 ' and solicitors, driver and drivers of bargains for con-
 ' tracts, who shall, after the said nine and twentieth day
 ' of September, take or receive, directly or indirectly,
 ' any sum or sums of money, or other reward or thing,
 ' for brokerage, soliciting, driving or procuring the loan,
 ' or forbearing of any sum or sums of money, over and a-
 ' bove the rate of 5 *sh.* for the loan or forbearing of 100 *l.*
 ' for a year, and so rateably, and above twelve-pence o-
 ' ver and above the stamp-duties, for making or ~~conveying~~
 ' of the bond or bill for loan, or forbearing thereof, or
 ' for

“ for any counter-bond or bill concerning the same, shall
 “ forfeit, for every such offence, 20 l. with costs of suit,
 “ and suffer imprisonment for half a year.”

In this manner the legislature has anxiously guarded against every cover and device that may be used, for supporting any exaction from debtors beyond the legal interest, for advance or loan of money; and even the expence of brokerage or reward for procuring the loan, is taxed to five shillings in the 100 l. and a shilling for making the bond. The same evil stands prohibited by many acts of the Scots parliament; and in general it may be held as a rule, that every attempt to impose higher interest, or harder conditions than the creditor is legally entitled to demand, falls to be reprobated as usurious, and the consequence is unavoidable, that the transaction must be annulled *in totum*.

To apply this to the present case, your Lordships will in the first place observe, that the bill in question has already been found to contain articles unwarrantably charged, to the amount of 262 l. Sterling. Some of these articles indeed are supposed by the subauditor to be owing to mistake, particularly the overcharges of interest and commission, and the entire omission of an article of 51 l. 11 s. 10 d. for which Mr Pitcairn ought to have had credit. The petitioners shall only observe upon these articles, that had the defender's dealings with Pitcairn been candid in every other respect, and had he showed no inclination to take advantage, they might have agreed with the auditor, in presuming, that these omissions and overcharges had been occasioned by accident. But when they find him obliging Pitcairn, in his then necessitous condition, to accept bills for immense sums beyond what were due; when they find him expressly charging articles for advance of money above the legal interest; and when they see that he has deceived the other creditors, and taken

a most unjust and exorbitant advantage to himself, they must be excused in not subscribing to the auditor's opinion or conjecture without evidence, as to these mistakes in the account being innocent or merely casual.

2dly, Independent of these mistakes, if the petitioners have been able to satisfy your Lordships, that the $\frac{1}{2}$ per Cent. of commission-money was improperly charged, the consequence seems plain, that it was usurious, and that it should be relevant *per se*, to void the security in which it is contained. Were any person to stipulate in a bond $\frac{1}{2}$ per Cent. for commission or trouble, besides the legal interest of 5 per Cent, there cannot be a doubt that this would be held as usurious; and the petitioners have endeavoured to show, that there is no real difference between the supposed case and the present. The nature of the transaction is the same, whether the money lent be on account of a bond or a bill. It is certain, that by this transaction, the defender, if he can make it effectual, will pocket $\frac{1}{2}$ per Cent. more than the legal interest, upon all the sums advanced by him; and it is a jest to pretend, that he is entitled to make that exaction, upon account of the clerks, and paper, &c. which he must necessarily have for carrying on the different branches of his business.

But 3dly, The matter does not rest here; for, by the subauditor's report, and the Lord Ordinary's interlocutor, there stands cut down from this bill another article, of no less than 188 l. 8 s. 4 d. Sterling, expressly on this footing, that it was an *improper charge*. The article meant is that of *drawing and remitting*, with regard to which the auditor gives it as his opinion, "that this method of borrowing money by a fictitious credit, of drawing and remitting London bills, however advantageous it may be to the dealers in exchange, is *pernicious and ruinous to shop-keepers*, and exposes them to *an exorbitant interest*:" For which reason the Lord Ordinary,

dinary, by his interlocutor, appointed this article to be struck off. The defender, in his answers to the last representation, pretended this article of drawing and remitting was only deduced upon his own consent. This however is not true; it was insisted in by him till the auditor gave his report against it, and the Lord Ordinary upon that report struck it off.

Mr Foggo, in his pleadings before the Lord Ordinary, endeavoured to defend this exaction upon two grounds, *first*, that it was warranted by Pitcairn's consent, as appeared from his letter in process; *secondly*, that it did not fall under the description of usury, because Mr Foggo did not make any profit this way, he having truly paid out so much for supplying himself with money, by drawing upon London, and remitting when his own money was in the hands of Pitcairn, for which reason he was justly entitled to be reimbursed by Pitcairn.

The first of these arguments is very improperly used by the defender, the fact being, that the letter appealed to affords an additional instance of the gross imposition practised on Pitcairn, and the advantage taken of his necessities. Mr Pitcairn does absolutely deny, that he ever authorized the defender to carry on this destructive trade of drawing and remitting, or that he ever understood any such charge was to be made against him till the 4th February 1764, when, in the settlement then made, he was obliged to submit to this most iniquitous charge, and even to sign a letter which Mr Foggo had brought along with him, and wrote with Foggo's own hand, in the following words, "As I am considerably indebted to you, and as it may possibly be inconvenient for you to lye out of the money, without borrowing it on my account, I hereby promise and oblige myself to repay you whatever expence you may be at on that account. I am, &c."

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As Mr Pitcairn could both read and write, though not so alert in business as the defender, this very circumstance of the letter being wrote by Foggo, and only signed by Pitcairn, shows plainly what was the true *res gesta*, and that the defender cannot avail himself of this letter, which was in reality a part of that most unjust and usurious transaction, which is the subject of this reduction. At any rate, your Lordships will observe, that this letter could only authorize him in time to come, and had no retrospect to past transactions; whereas the charge now complained of is for drawing and remitting from May 1763 to February 1764, the date of the letter and clearance. How he came to draw back this charge to May 1763, when there was a clearance in July that year, including all prior transactions, is indeed extremely inconceivable. The clearance in February 1764, was only for the time that had elapsed since the last clearance, being about six months, during which their whole transactions had amounted to no more than 464 *l.* Sterling, and yet no less than 188 *l.* 8*s.* 4*d.* is stated as the expence of drawing and remitting, besides the legal interest, commission-money, and a large sum for interest; an instance of such glaring extortion as has seldom been paralleled.

At the same time, not the least evidence or voucher was produced to Mr Pitcairn of any such expence having been incurred, and even in this process, when inspection of his books was demanded, in order to know how this sum arose, and if the charge was fairly stated, it was confessed, that he kept no separate account, from which it could appear what part of the expence incurred by him in drawing and remitting was relative to Pitcairn; for that the whole of his transactions in this way, had been engrossed in one great account with his London correspondent, so that it was only by calculation or conjecture that he had fixed on this charge as corresponding to the sums he had lent to Pitcairn.

Pitcairn. In this way it was impossible there could be any check upon him ; nor can it to this day be ascertained, whether he did not really make profit, in place of sustaining loss, on those particular draughts, which he pretends to have made with a view of replacing money he lent to Pitcairn.

He himself explains the nature of this transaction to be as follows. In order to procure an immediate supply of cash, he draws a bill upon his correspondent at London Anf. to last Rep. p. 12. at a long date, which he sells, and afterwards, when it becomes due, he remits to answer it in the best manner he can. The expence attending this method, says he, depends on the rate of exchange between the time of drawing and the time of remitting. If it should happen to sink, this may even be attended with profit, but if it rises in the mean time, it must be attended with loss. It now comes out, by Mr Foggo's acknowledgement, that he did not follow this practice of drawing and remitting, merely to raise a particular sum or sums to be put into the hands of Pitcairn, but in general he found it necessary, about that time, to follow this expensive method of raising cash, to answer his own exigencies as a banker ; and from his accounts with Pitcairn it is clear, that, during the time of his following this practice, they had very few transactions, so that a very inconsiderable part of the money thus raised, must have been applied to Pitcairn, and whether he made profit or loss on the particular sums raised by him, to supply the cash lent to Pitcairn, is a circumstance which neither does nor can appear.

But, *secondly*, supposing it were instructed that he had really been out of pocket, to the amount charged by him, in raising the particular sums which he lent to Pitcairn, (a fact by no means admitted), what right had he to state this expence to the debts of Pitcairn? It has already been said, that Pitcairn neither knew nor authorized this method

method of raising money at that time; and supposing he had authorized it, this would not have been a sufficient defence; because the general case of every usurious contract, is, that the unfortunate debtor gives his consent, which however is not sufficient to validate the transaction.

The stating this expence against Pitcairn, supposing there were evidence of it, was plainly an usurious exaction. Pitcairn was not bound to enquire in what way Mr Foggo furnished himself with the money advanced to him, or how he supplied the want of it in his other affairs. It may have been a disadvantage for Mr Foggo to lye out of the money advanced by him to Pitcairn, and in order to replace that money, as well as to answer his other exigencies, it may have become necessary for him to take a method of raising money which was attended with expence; but the law does not permit any article of this kind to be stated by a creditor against his debtor. The legal interest of *5 per Cent.* is supposed to be a full remuneration for every loss or inconvenience which the creditor may sustain, and if he is not satisfied with that premium which the law has given him, he ought to call for and recover his principal sum.

Let it be supposed, that a person, after having lent his money, finds that he has immediate occasion for an equivalent sum, which he has no way of instantly raising, but by selling some of his effects at an undervalue, would he be entitled to exact this loss from his debtor, besides the legal interest of the money? Or, put the case, that a man agrees to advance money to his friend, under this express condition, that he shall not only repay the sum and legal interest, but also indemnify the lender for every inconvenience or loss which he may thereby sustain in his own affairs, though this should amount to *50 per Cent.* of the capital sum lent; such transactions would undoubtedly be

be held usurious, and would of course be rendered void. It is of no consequence, that the lender puts nothing in his pocket; for the law does not permit any device or pretence whatever whereby more than 5 *per Cent.* is given for the use of money, or forbearance of payment for a year.

The present case is much less favourable for Mr Foggo than any of those mentioned; for in fact it comes out, that this practice of drawing and remitting was merely with a view to the support of his own credit as a banker, and to bring money into his hands for carrying on his daily business, after his transactions with Pitcairn were almost entirely at an end; and if any part of his distress was owing to his having so great a balance of money in the hands of Pitcairn, he ought to have taken measures for operating his payment; and had he done so as far back as June or July 1763, when the great balance became due, and when he knew Pitcairn to be in labouring circumstances, a great part of the loss now sustained by the other creditors would have been prevented. But, in place of that, he forbears demanding his money from Pitcairn for six months longer, during which period he encourages your petitioners to trust their goods as usual, and for this six months forbearance, which the petitioners will be allowed to call *fraudulent*, he musters up articles of interest, commission, insurance, drawing and re-drawing, to the amount of about 17 *per Cent.* of the sums due, besides overcharges in calculation to a considerable extent. If this be not usury, the petitioners are really at a loss to understand what is thereby meant, or how it is possible, that any person can be convicted of it, unless by entering into a formal bond on stamp paper (a thing that no man in his senses will ever do), stipulating expressly, that he shall receive more than the legal interest for the loan of his money.

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In the last place, the petitioners submitted to the Lord Ordinary, and are now again to submit to your Lordships, that even if there should be any doubt of bringing these transactions under the denomination of usurious, they carry in them such intrinsic marks of imposition, and unfair advantage on the part of the defender, that they ought not in law to be sustained to give him a preference over the other creditors. The conveyances made in his favour a few days before the bankruptcy, are given up as clearly reducible upon the act 1696; but there may be some doubt if the large bill, dated 4th February 1764, on which the diligences were afterwards used by Mr Foggo, falls under the act of parliament, as Mr Pitcairn did not retire to the Abbey till a day or two after the 60 days, though he was under diligence on the 3d of April, which was within the 60 days: At the same time, when your Lordships consider, that this bill appears now confessedly to have been granted in part for sums which were not due, and which were most improperly and illegally charged, it is submitted, that the parties ought to be held precisely in the same case as if no such bill had been granted; and consequently, that the diligence used on that bill, can be of no avail to the defender.

The whole transactions were of such a nature, as place the conduct of the defender in the most unfavourable light; and it would be extremely hard, if he should obtain a preference over all the other creditors, and full payment of all his debts, merely by his own unjustifiable operations with the bankrupt. He, in the first place, takes securities for his debt, and possesses himself of every bill or other writing belonging to Pitcairn, without giving any receipt or voucher in return; so that had both or either of the parties died, as their heirs would have been ignorant of the transaction, the consequence might have been a claim for double payment, besides a chance of recovering 2000 *l.* of insurance over and above. He, in
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the next place, in his clearances, accumulates interest, commission, insurance, premium, expence of drawing and remitting, and every charge which he can possibly devise to swell the balance in his favour, makes Pitcairn sign letters, accept bills, furnish him with lists of debts, and while these operations are going on, he persuades those who formerly dealt with him, to go on and furnish him with goods as usual, till at last, having brought his schemes to maturity, and finding the shop well stocked with those goods which the petitioners had furnished, he makes a sudden demand, forces Pitcairn to grant assignments in his favour, of certain shares which he had in a copartnery and in a ship, and the very next day takes out diligence, renders him bankrupt, and attaches the whole shop goods belonging to him, by sequestration and poinding, which he was enabled to do by his intimate knowledge of Pitcairn's affairs, before any creditor could have an opportunity of competing with him. The petitioners do, with submission, say, that as the bill itself on which these diligences proceeded, cannot in law or in justice be supported, the diligences themselves ought to fall to the ground, the consequence of which, if your Lordships do not find the usury proved, will only be, to bring him in *pari passu* with the other creditors under the trust-right; which is certainly doing him no injustice, considering the way and manner in which these creditors were deceived by him.

The only answer made to this part of the plea before the Lord Ordinary, was, *1mo*, That the libel of reduction contained no conclusion to this purpose: And *2do*, That there was no ground in law for a *pari passu* preference, as the defender had not acceded to the trust-right.

To the first of these observations it is answered, that the libel contains every conclusion for reducing the defender's claims, either in whole or in part. The 6th conclusion

conclusion is in these words, " Mr Foggo ought not to
 ' be allowed to avail himself of the advantage he has thus
 ' unduly obtained, in prejudice of the other onerous cre-
 ' ditors ; especially as the said George Pitcairn has made
 ' a fair surrender of his effects, and conveyed the same
 ' to the trustees, for the common interest of the whole,
 ' on the day he received the charge from the said Sam-
 ' uel Foggo, and has since retired to sanctuary." And
 the last conclusion is in these words, " And lastly the
 said George Pitcairn, and his said trustees pursuers, are
 ' advised that this is a case which calls aloud for the inter-
 ' position of the justice of the said Lords, to procure an
 ' equality at least amongst the said George Pitcairn's cre-
 ' ditors, and to prevent this horrid debt from sweeping
 ' away every shilling; and therefore, and for other reasons
 ' to be insisted on at discussing, &c."

As to the second observation, That whatever ground in
 law there may be for a total reduction of the debt, there
 is none for a *pari passu* preference. The defender mistakes
 the argument maintained by the Petitioners. They do,
 with submission, apprehend, that though your Lordships
 should not incline to set aside and forfeit the debt itself
 on the head of usury ; yet you may, on the strong cir-
 cumstances of fraud and unfair advantage which appear
 in this case, reduce and set aside *the bill* as a security ; and
 consequently the diligence proceeding on that bill, leav-
 ing the defender to stand on the footing of his books
 and accompts, from which he may, no doubt, be able to
 instruct, that he is a just and lawful creditor to a certain
 extent; and upon that footing, though he will be cut out
 of the preference which he has unjustly obtained, he will
 necessarily come in for his share under the trust-right, if
 he chuses to be included in it.

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May it therefore please your Lordships, to alter the interlocutors of the Lord Ordinary, and to find, 1mo, That the article of commission is improperly charged. 2do, In respect of that, and of the other articles already disallowed, particularly the article of charges upon drawing and remitting, to find the bill taken by the defender from Pitcarne, dated 4th February 1764, null and void, as containing usurious transactions, and to decern and declare accordingly: At least, 3tio, Upon the whole circumstances and complexion of the case, to reduce that bill, together with the other conveyances granted by Pitcairn to the defender, and the preference thereby acquired, and the diligences executed upon the bill, to the effect of bringing him in pari passu with the other creditors under the trust-right, in so far as, upon a just compt and reckoning, he shall instruct that he is a real and true creditor to the bankrupt.

According to Justice, &c.

G I L A Y C A M P B E L L.

R E P O R T

IN THE

PROCESS of REDUCTION,

George Pitcarne and his Trustees, *Pursuers*;

A G A I N S T

Samuel Foggo and his Trustees, *Defenders*.

THIS Report is humbly made, in pursuance of an interlocutor pronounced by Lord Kaims, the 6th July 1765, "Remitting to Francis Farquharson accountant, to state an account of what is justly due, and to remark upon the articles overcharged, whether they appear to be errors only, or designedly overcharged."

INTRODUCTION.

THE Pursuers insist for Production of *George Pitcarne's* accepted bill to *Samuel Foggo*, dated 4th February 1764, for 4,633 *l.* 3 *s.* 2 *d.* and of another bill dated the 18th February 1764, for 57 *l.* both payable one day after date, to be reduced on the head of usury, by the defender's taking more than the legal interest, and by his exacting commission for the loan of money, and the charges of drawing and remitting London bills, &c.

The libel sets forth, That the defender, at the time of getting the pursuer's acceptance to the bill of 4633 *l.* 3 *s.* 2 *d.* exhibited a note or schedule, whereof the following is a copy, viz.

1763, July 18. Your acceptance	-	-	-	-	-	-	-	-	£. 4115	0	0	
Interest on ditto to the 4th February	-	-	-	-	-	-	-	-	113	6	0	
Insurance premium of policy	-	-	-	-	-	-	-	-	100	5	6	
Exchange on remitting ditto	-	-	-	-	-	-	-	-	2	11	6	
Balance your account current	-	-	-	-	-	-	-	-	113	10	10	
Charges of drawing and remitting	-	-	-	-	-	-	-	-	£. 245	4	9	
Ditto commission	-	-	-	-	-	-	-	-	40	18	0	
									Sum	£. 286	2	9
Interest on the several sums drawn till remitted										97	14	5
									Remains			
										188	8	4
										£. 4633	3	2

The

The original of this note or schedule, said to be Samuel Foggo's holograph, is in process; and there is likewise in process, printed papers agreed by both parties to contain copies of all the accounts settled by the parties, from the commencement of their dealing, beginning the 11th October 1760, and ending the 4th February 1764.

It appears by this account, That the manner of their dealing was this; Mr Foggo furnished Mr Pitcarne from time to time with money, and with bills on London; these are charged on the debit-side of the account, with interest and commission; on the other hand, Mr Pitcarne is credited by the payments he made from time to time to Mr Foggo.

During the period of their dealing, they settled four accounts, whereof the debits, credits and balance stand thus, viz.

Dates of settling.	Mr Pitcarne.	Debitor.	Creditor.	Balance.
1761, June 29.		£. 3247 4 5	£. 2611 15 3	£. 635 9 2
1762. Sept. 10.	£. 635 9 2 2545 15 10 1683 0 0	3181 5 0 5354 9 0	1498 5 0 1239 9 0	1683 0 0 4115 0 0
1763. July 20.	3671 9 0 4115 0 0	5081 17 9	448 14 7	4633 3 2
1764. Feb. 4.	966 17 9			

From this abstract it appears, that Mr Foggo was always in advance, and that the balances due by Mr Pitcarne were continually on the increase.

FOLLOWS the Sub-auditor's REPORT.

The sub-auditor having thus given a view of the parties method of dealing, and an abstract of their accounts, proceeds next to the particular articles challenged by Mr Pitcarne, viz.

Mr Pitcarne contended on several instances of overcharge of interest, which the sub-auditor appointed Mr Foggo to examine, and to admit or refuse. Interest.
Mr Foggo exhibited a progressive account of the interest, whereby it appears, that in the whole there is 1*l*. 6*s*. 1½*d*. overcharged on about 90 different progressions or calculations.
Mr Pitcarne has made no objections to the exactness of this progressive account.

The sub-auditor is humbly of opinion, That this overcharge of one pound six shillings one penny three twelfths, arises from errors only, and not from any design to overcharge; but that it ought to be deducted from the bill under reduction. Commission.
Mr Pitcarne objected to the article stated for commission, amounting to 30*l*. 3*s*. 7*d*. That commission ought not to be charged, but where the party negotiates buying or selling, which was not the case here, as Mr Foggo had no trouble but to lend and receive money on the spot. At the same time Mr Pitcarne acknowledges, that he suffered commission to be debited against him at their different clearances, without challenge, from fear of offending Mr Foggo, and by that means provoking him to withdraw his credit, which might have proved of worse consequence. *2do*, He alledged that the article of commission in one instance was clearly overcharged 3*l*. 3*s*. 6*d*.

It was answered for Mr Foggo, That he opposes the universal practice; that all the money-dealers in Edinburgh take commission, as being the only reward they have for paying their clerks, keeping a counting-house, books, accounts, and ready access to cash, to answer the demands of their correspondents. *2do*, There may perhaps be some instances, where bankers do not charge commission against such of their correspondents who lodge money with them at 4*per Cent*; because in this case the bankers, by lending the money at 5*per Cent*. reap the benefit of 1*per Cent*. But that Mr Foggo had no benefit of

of this kind by Mr Pitcarne's business, Mr Foggo being always in advance for him. *3^{to}*, That the articles for commission were homologated by Mr Pitcarne, by his having sustained it from time to time without challenge; and as to the 3 *l.* 3 *s.* 6 *d.* for commission, overcharged in the account settled 10th September 1762, it was obviously a mistake, which Mr Foggo has all along acknowledged, and agrees it be deducted.

The sub-auditor having enquired into the practice of the bankers of Edinburgh, with regard to commission, and finding that they are in use to debit their correspondents with commission, and that Mr Pitcarne has suffered commission to be charged against him in all the accounts settled with Mr Foggo, without any challenge; he is therefore humbly of opinion, that the thirty pounds three shillings and seven-pence, may be sustained, except three pounds three shillings and six pence overcharged by mistake: And he is humbly of opinion, that the three pounds three shillings and six-pence, with the progressive interest thereon, from the 10th September 1762 to the 18th July 1763, and from that to the 4th February 1764, amounting in all to three pounds eight shillings Sterling, ought to be deducted from the bill under reduction.

*Charges of
drawing and
remitting.*

Mr Pitcarne objected to the article of 188 *l.* 8 *s.* 4 *d.* for charges of drawing and remitting; *1^{mo}*, That Mr Foggo never acquainted him that he was supplying his credit at this expence, untill their clearance the 4th February 1764. *2^{dc}*, That Mr Foggo has kept no regular separate exchange-account of bills drawn and remitted on Mr Pitcarne's proper account; he has only exhibited an excerpt picked from his general exchange-account, which cannot be regarded. *3^{dly}*, This excerpt runs from May 1763 to January 1764, during all which period Mr Foggo has charged Mr Pitcarne with a separate article for interest, which with this 188 *l.* 8 *s.* 4 *d.* is about 10 *per Cent.* of all the money he owed to Mr Foggo.

It was answered for Mr Foggo, that his large advances for Mr Pitcarne put him under the necessity of supporting his credit by means of drawing and remitting London bills; and he appeals to Mr Pitcarne's letter the 4th February 1764, that he had acquainted him with this measure, in so far as Mr Pitcarne writes that letter, "That he was considerably indebted to Mr Foggo, and that it might be inconvenient for him to lye out of his money without borrowing; therefore Mr Pitcarne obliges himself to repay what-soever expence Mr Foggo might be at on that account." And with regard to the bills drawn and remitted on Mr Pitcarne's proper account, Mr Foggo acknowledges that he kept no separate account thereof, but only a general exchange-account with Mr McIntosh his London correspondent, wherein the draughts and remittances for Mr Pitcarne are included, although not distinguished, but that he kept a separate jotting of these at the time, which is now produced to support the article.

The sub-auditor is humbly of opinion, that this method of borrowing money by a fictitious credit of drawing and remitting London bills, however advantageous it may be to the dealers in exchange, is pernicious and ruinous to shop-keepers, and exposes them to an exorbitant interest; and therefore, and that the article in question arises from transactions anterior to the date of Mr Pitcarne's letter, the sub-auditor is humbly of opinion, that the one hundred and eighty-eight pounds eight shillings and four-pence Sterling, may be repelled, and deduced from the bill under reduction.

Mr Pitcarne objected, That Mr Foggo had omitted to give him credit for 50 *l.* 6 *s.* 9 *d.* remitted him the 6th August, 1763.

Mr Foggo acknowledged the omission, and produced an excerpt from his day-book and journal, where the article was regularly posted, but by mistake omitted in the ledger.

The sub-auditor is humbly of opinion, That this article, with the interest thereof, ought to be deducted from the bill under reduction.

And in terms of the above report, the account betwixt the parties, in so far as respects the bill for 4633 *l.* 3 *s.* 2 *d.* stands thus, *viz.*

Principal

Summary

Deduct

f. 244 14 3³₁₈

Balance

f. 4388 8 103

The objection against the article for insurance of Mr Pitcarne's life, is also withdrawn and past from, in respect of the order and policy now produced.

Edinburgh, Februarq 18. 1766.

FRAN. FARQUHARSON.

Mr Pitcarne alledges he gave several London bills to Mr Foggo, whereof he exhibited a list, amounting to 7333 *l.* 19*s.* and that Mr Foggo had not given him credit for the exchange he received at selling the bills.

Mr Foggo exposed his books, and by a report on the examination thereof signed by him and Mr Pitcarne, the 30th January 1766, it appears, that the bills being payable at long dates, from 60 to 90 days, several of them were sold at par, and that some of them were sold along with other bills, at an exchange received on the whole *in cumulo*: That, by this means, the exchange received on Mr Pitcarne's bills, could not be distinguished from the others, which may have been at shorter dates, and in different qualities and circumstances. Upon this head Mr Foggo gave in remarks, setting forth, that these transactions have no relation to the question now in issue; besides they were finished transactions by the delivery of the bills; That the bills being all at long dates and suspicious, could not be circulated but by a man of credit indorsing them, and thereby taking on him the risk of their being returned.

The sub-auditor observes on this report,

That, 4403 l. 10 s. of the bills were sold at par, or no exchange received on them.

That for 943 l.	Mr Foggo received of exchange	-	-	-	-	£.	5	8	3
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That 1987 1/2. were sold with other people's bills and exchange received
on them, of which the same proportion is about

L. 7333 10.

10. Mr Pitcarne alledges he gave Mr Foggo several Edinburgh bills; That Mr Foggo deducted the interest on these bills, and a half *per Cent.* commission, and gave him receipt: or credit for the residue only; and Mr Pitcarne exhibited a list of these bills, amounting to 930 *l.* 6 *s.* 4 *d.*

he

The sub-auditor recommended to Mr Foggo to examine his books, and condescend on the commission he exacted from Mr Pitcarne upon them; and Mr Foggo has produced a condescendence of the commission or discount which he received on these bills, amounting to

£. 0 14 4

Lastly, Mr Pitcarne gave in a paper of observations, setting forth, that in the course of their dealing, Mr Foggo had debited him with sundry articles for charges on returned bills, and for interest for commission, for insurance of his life, and for charges of drawing and remitting, viz.

Charged on returned bills	£. 59 17 11
Interest	240 16 11
Commission	30 3 7
Life-insurance	102 18 0
Charges of drawing and remitting	188 8 3

In all £. 622 4 7

All this is comprehended in the above 463 £. 3 s. 2 d. contained in the bill under reduction.

Edinburgh, February 18. 1766. This memorandum is also humbly reported by me,

FRAN. FARQUHARSON.

11 JUL 62